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Obliteration and Revocation in the Law of Succession

Re McEnroe [2021] IECA 28*

Introduction

When should the testator's act of obliterating text in a will, subsequent to the execution of the will, be effective to remove that text from the will? The recent decision of the Irish Court of Appeal in *Re McEnroe*¹ highlights an interesting difference between English and Irish law on the point and raises the question of which approach is preferable. The English position is set out in section 21 of the Wills Act 1837, which provides that:

“No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, *except so far as the words or effect of the will before such alteration shall not be apparent*, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will...”²
(author's emphasis)

The italicised clause (“the proviso”) creates an exception to the general position that a will cannot be amended after its execution unless the amendments are themselves executed; a partial revocation is accomplished if words are rendered “not apparent”. The case law has established that words are “not apparent” if they cannot be read without “resort to ... physical interference with the document, so as to render clearer what may have been written upon it”.³

The same provision was applicable in Ireland until its replacement by section 86 of the Succession Act 1965. The new provision is essentially the same as section 21 of the Wills Act except that it omits the proviso. This raised problems on the facts of *Re McEnroe*. Ms McEnroe, a retired company secretary, died at the age of 87 in 2017. She had never married or had children. The net value of her estate was a little over €1,000,000. She had executed her

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¹ [2021] IECA 28 (on BAILII).

² The section goes on to provide that alterations will be deemed to have been properly executed “if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.”

³ *Ffinch v Combe* [1894] P 191, 201 (Sir Francis Jeune P). This rules out the use of chemicals or infrared photography, for example, but not the expert use of magnifying glasses: *Re Ibbetson's Goods* (1839) 2 Curt 337.

will in 2005, “a homemade pre-printed will, written on two sides of a single sheet of paper”.⁴ A single line of the will, containing a gift of unknown property to an unknown beneficiary, had subsequently been scored out by the testatrix with a ballpoint pen, this alteration not having been executed.⁵ The original text could not be deciphered, despite the attempts of a handwriting expert.⁶ No extrinsic evidence was available to allow the missing line to be reconstructed.

Under English law, no problem would have arisen; because the text had been made “not apparent”, there would simply have been a partial revocation. However, because Irish law does not contain the section 21 proviso, this solution was not available. According to Ní Raifeartaigh J, giving judgment for the Irish Court of Appeal in *Re McEnroe*,⁷ this left the court with “the following conundrum: the alteration is not valid and is presumptively of no effect, but the unaltered portion of the will is no longer known and therefore cannot be given effect as if the alteration had never been made.”⁸ The concern was that, because the full content of the will could not be ascertained, the will might have to be treated as invalid, leading to an intestacy. The matter arose upon an ex parte application to have the will admitted to probate. At first instance,⁹ Allen J was unwilling to grant the application without notice to those who would have benefitted upon intestacy. However, on appeal, Ní Raifeartaigh J concluded that such notice was not necessary. This was because she regarded the testatrix’s act of obliteration as amounting to a partial destruction of the will, accomplishing a revocation by destruction of the words in question under section 85(2) of the Succession Act 1965. This provision is based on section 20 of the Wills Act 1837, which provides that a will can be revoked *inter alia* “by the burning, tearing, or otherwise

⁴ [2021] IECA 28 [2].

⁵ There was also another obliteration and the interlineation of a single word. In the end, these alterations did not cause the court any difficulty (see *ibid*, [12], [14], [47]) and they are not discussed here. The case illustrates the problems that can arise where a testator has made or altered a will without legal advice. It remains to be seen whether a likely increase in such activity in the circumstances of the Covid-19 pandemic has stored up legal disputes for the future.

⁶ *ibid*, [15].

⁷ Whelan and Binchy JJ concurring.

⁸ [2021] IECA 28 [23]. One solution that was suggested on behalf of the applicant in *McEnroe* was that the court could treat the obliterated text “as void for uncertainty”: *ibid*, [37], [45]. Ní Raifeartaigh J commented that she would have been inclined to accept this argument but that, because the matter was not the subject of detailed submissions, she preferred not to rest her conclusion on this basis: *ibid*, [79]. In fact, the “void for uncertainty” approach is misconceived because it ignores the distinction between the role of the court as a court of probate (determining the validity of the alleged will) and as a court of construction (interpreting the terms of the will that has been admitted to probate). It would only be if a prior decision had been made to admit the will in *Re McEnroe* to probate that one could reach the question of how to construe the relevant part of the will (and the central problem in the case, as the Irish Court of Appeal viewed it, was whether it was permissible to admit the will to probate).

⁹ [2020] IEHC 421 (on BAILII).

destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.” The relevant part of section 85(2) of the Succession Act is worded in slightly different terms, referring to “burning, tearing, or destruction” rather than “burning, tearing, or otherwise destroying”.

Ní Raifeartaigh J relied on the English case of *Re Adams*,¹⁰ where Francis Ferris QC, sitting as a deputy High Court judge, held that scoring out text in a will, so as to make it “not apparent” within the terms of section 21 of the Wills Act, constituted partial revocation by destruction under section 20 of the Wills Act.¹¹ However, it seems that Ní Raifeartaigh J did not fully adopt the English position as stated in *Re Adams*. She stated that destruction would occur “[i]f words are scored out with a pen to the extent that they are no longer decipherable even with the assistance of the techniques used by a handwriting expert”.¹² Thus, the judge was referring to obliteration “to the point of absolute illegibility”.¹³ The implication is that merely making the words “not apparent” (as would be sufficient under section 21 of the Wills Act) is insufficient in Irish law to revoke those words by destruction.¹⁴

This case note will analyse the decision in *Re McEnroe*, beginning by assessing the decision in *Re Adams*, the primary authority on which the Irish Court of Appeal relied. It will be suggested that the treatment of obliteration as a form of destruction in *Re Adams* was both unconvincing in principle and unnecessary to the resolution of the case itself and that, in any case, it is not legitimate to transplant the reasoning in *Re Adams* to the different Irish legislative context. It will then be pointed out that there are policy objections to the Irish Court of Appeal’s finding that obliteration to the point of “absolute illegibility” amounts to partial revocation by destruction. Next, it will be argued that the courts in *Re McEnroe* were under a misapprehension in thinking that the will might have to be declared invalid if one line could not be read; the cases on lost wills show that the courts are willing to admit a will to probate, even if it cannot be reconstructed with complete accuracy, in order to avoid thwarting the testator’s intentions. Therefore, the Irish Court of Appeal was correct to admit

¹⁰ [1990] Ch 601.

¹¹ [2021] IECA 28 [57]-[59].

¹² *ibid*, [72].

¹³ *ibid*, [68].

¹⁴ It is not impossible that Ní Raifeartaigh J intended to leave the point open since her statement of the Irish position (*ibid*, [72]) referred only to words that have been crossed out but remain legible (still valid under s.86) and to words that have been rendered “absolutely illegible” (revoked by destruction under s.85(2)), omitting mention of the status of words that have been made “not apparent” but which, because they can be read with the assistance of artificial techniques, are not “absolutely illegible”. However, it is very difficult to argue that despite the elimination of the proviso, which specifically states that making words “not apparent” will be effective to revoke them, the law in Ireland remains the same as that in England, and somehow still turns on whether the words have been made “not apparent”.

the will to probate with blank space in place of the obliterated words, but was mistaken to hold that this was as a result of a partial revocation of the will. The practical difference between the two approaches would emerge in a case where (unlike in *Re McEnroe*) extrinsic evidence was available as to the content of the obliterated part of the will. On the approach that will be advocated in this case note, no valid revocation has taken place and, therefore, it is clearly permissible to reconstruct the missing part of the will by reference to extrinsic evidence. In contrast, notwithstanding a hint of ambivalence on the part of Ní Raifeartaigh J in relation to this point,¹⁵ it inevitably follows from her approach, which involves the premise that the testatrix validly revoked the words in question, that extrinsic evidence of their content would have to be ignored. The case note concludes by arguing that the deletion of the proviso from section 21 of the Wills Act 1837, along the lines of the current Irish position, could well represent an improvement in the law in England and Wales.

Problems with the Reasoning in *Re Adams*

In *Re Adams*,¹⁶ the testatrix had used a pen to scribble out her own signature and that of the two witnesses. The signatures had been crossed out so heavily as to render them “not apparent” under the test applicable to section 21 of the Wills Act 1837. Francis Ferris QC, sitting as a deputy High Court judge, held that this was sufficient to revoke the will as a whole. He relied upon the early case of *Hobbs v Knight*,¹⁷ where the testator had physically cut his signature from the will. In *Hobbs*, Sir Herbert Jenner held that, if the testator’s name has been removed from the will, then “the essential part of the will is removed and the will is destroyed”.¹⁸ Sir Herbert Jenner went on to suggest *obiter* that the same result would follow if, instead of cutting out his signature, the testator had obliterated his signature so that it was “not apparent” for the purposes of section 21 of the Wills Act 1837.¹⁹ This *obiter* view was adopted by Francis Ferris QC in *Re Adams*.²⁰ He considered that obliteration could amount to a form of destruction under section 20 and, without offering any further explanation of the relationship between the two sections, identified the “not apparent” test from section 21 as the standard for destruction by obliteration under section 20.²¹ His ultimate conclusion was

¹⁵ *ibid*, [78].

¹⁶ [1990] Ch 601.

¹⁷ (1838) 1 Curt 768.

¹⁸ *ibid*, 779.

¹⁹ *ibid*, 780.

²⁰ [1990] Ch 601, 607.

²¹ *ibid*.

that the signatures had been “destroyed” for the purposes of section 20 of the Wills Act, and that therefore the will as a whole had been revoked.²²

(i) *Does Obliteration Amount to Destruction?*

As a matter of principle, it is questionable whether obliteration can legitimately be seen as constituting a form of physical destruction. Francis Ferris QC rejected the argument that, on the facts of *Re Adams*, the relevant signatures were “still there” and had merely been “overlaid by some new substance” (ink from a ballpoint pen), so that “nothing has been destroyed.”²³ However, he did not provide any reasoned justification for his approach, beyond stating that he did not think that obliteration of a signature should be treated differently to a physical cutting out of the signature.²⁴ The idea of treating obliteration as destruction seems even less convincing on different facts where, rather than being scribbled out with a pen, the text has been made “not apparent” through pasting a slip of paper over it.²⁵ The concealed text has been revoked under section 21; however, it seems highly implausible to suggest that it has been “destroyed” under section 20 of the Wills Act, given that it would be capable of being read without difficulty after removing the slip of paper.

(ii) *Equation of Obliteration and Destruction Unnecessary*

As has been mentioned, in *Re Adams*, Francis Ferris QC adopted the *obiter* view of Sir Herbert Jenner in *Hobbs v Knight* that the obliteration of the testator’s signature, such that it was “not apparent”, would revoke the will as a whole. It seems, however, that Francis Ferris QC did not fully grasp Sir Herbert Jenner’s logic. Sir Herbert Jenner had explained in *Hobbs* that, in order to come within the meaning of the words “otherwise destroying” in section 20 of the Wills Act 1837, it was not necessary “that the material of the bill should be destroyed; it is sufficient ... if the essence of the instrument (not the material) be destroyed.”²⁶ Sir Herbert Jenner envisaged that the obliterated signature would have been revoked under section 21, since it was no longer “apparent”, and that the removal of this essential part of the will would be sufficient to “otherwise destroy”, within the terms of section 20 of the Wills Act, the “essence” of the will as a whole. It is not necessary to Sir Herbert Jenner’s position that the revocation of the signature under section 21 itself be seen as involving the partial

²² *ibid*, 608.

²³ *ibid*, 607.

²⁴ *ibid*.

²⁵ Note e.g. the facts of *In the Goods of Itter* [1950] P 130.

²⁶ (1838) 1 Curt 768, 779.

physical destruction of the will (although there was partial physical destruction on the facts of *Hobbs* itself, where the signature had been physically cut out of the will). Thus, there was no need for Francis Ferris QC to introduce the novel proposition that the revocation of text under section 21 of the Wills Act involves destruction under section 20.

The Reasoning in *Re Adams* Cannot be Transplanted to the Irish Context

In *Re Adams*, Francis Ferris QC stated that section 21 “is couched in the negative but if one turns it into positive form one effect of it is that where the original words are not apparent an unattested alteration will have the effect of revoking them.”²⁷ It seems clear that the existence of the proviso was necessary to Francis Ferris QC’s reasoning. As Allen J noted at first instance in *McEnroe*, Francis Ferris QC “got to [his] conclusion by reference to s. 21 of the Act of 1837 and specifically by adopting and applying the test which is applied in England for the purpose of determining whether there has been a partial revocation – which turns on the proviso [in section 21] which in this jurisdiction was left behind on 1st January, 1967” (when the Succession Act came into force).²⁸ This suggests that it is not safe to rely upon the authority of *Re Adams* in a jurisdiction which has repealed the proviso in section 21.

It is also crucial to remember that the only part of section 21 that Irish law has discarded is the positive part, the proviso that allows revocation by making text “not apparent”. Even if scoring out certain words in a will so as to make them absolutely illegible would prima facie fall within the definition of “destruction” in section 85(2) of the Succession Act, this is surely overridden by the express terms of section 86 which (reflecting the negative part of section 21 of the Wills Act) states plainly that: “An obliteration... made in a will after execution shall not be valid or have any effect, unless such alteration is executed as is required for the execution of the will ...” To treat an obliteration as amounting to destruction, and therefore as accomplishing a partial revocation of the will, clearly contradicts the specific wording of section 86. The maxim of statutory interpretation *generalalia specialibus non derogant* must apply to ensure that the general reference to “destruction” in section 85(2) gives way to the specific provision in section 86 as to the effect of an “obliteration”.

Policy Objections to the Approach in *Re McEnroe*

²⁷ [1990] Ch 601, 607.

²⁸ [2020] IEHC 421 [22].

Two points of policy may be made relating to the position established in *Re McEnroe*, whereby the testator can revoke text in the will by obliterating it to the point that it is “absolutely illegible”. First, it does not seem to make sense for the law to tell testators, in effect, that this is a method of amending a will informally. While not fully ideal in this respect, the English test (turning on whether the text is “not apparent”) is at least one that could guide the behaviour of a testator. In the early case of *Townley v Watson*,²⁹ for example, the testatrix had confirmed with her servant that, even when held up to the light, the obliterated text was illegible.³⁰ By contrast, it is hard to see how a testator could judge whether an obliteration had made the text “absolutely” illegible, so that even, for example, the use of infrared photography would not allow it to be deciphered. Therefore, a testator would be unable to be sure of the content of his will after making an obliteration.

Secondly, the test under section 21 of the Wills Act is essentially stable; the answer to the question of whether the original text is readable by ordinary means is independent of possible advances in technology over the years. So, if the text was unreadable after the testator obliterated it, it will still be unreadable when the court comes to pronounce on the matter after the testator’s death. The position is, in principle, different in relation to the test favoured by the Irish Court of Appeal. A testator might obliterate certain text, accomplishing a partial revocation of the will. Then, some decades later (but still in the testator’s lifetime), advances in infrared photography or other scientific techniques might make it possible to decipher the previously indecipherable text. A court considering the issue after the testator’s death would find that the text was not “absolutely illegible” and so conclude that there had not, after all, been any partial revocation of the will. It would not, however, make sense for the law not to give a fixed answer to the question of whether a particular act of the testator accomplished a partial revocation of the will, with the content of a person’s will liable to change with the advent of an advance in technology.³¹

Solving the Conundrum in *Re McEnroe*

The decision in *Re McEnroe* was made more difficult by the misconception that, unless the obliteration in question amounted to a valid revocation by the testator, the entire will was liable to be treated as invalid. However, the “conundrum” that exercised the court – related to

²⁹ (1844) 3 Curt 761

³⁰ *ibid*, 762.

³¹ It does not seem possible to avoid the problem by suggesting that the effect of an obliteration is to be judged by the technology available at the time the testator made the obliteration. It would often be impossible to be precise as to the date when a will, in the possession of the testator for many years, was altered.

obliterated text that is still validly part of the will but which cannot be deciphered or reconstructed – could arise in other situations where straining to find a partial revocation by the testator would not be possible. In *Sugden v Lord St Leonards*,³² Jessel MR mentioned the example of a will that had been eaten by rats.³³ It is not difficult to come up with less alarming examples: the will could have been damaged accidentally, or an obliteration (to the point of absolute illegibility) might have been made by the testator at a time when he lacked the capacity to revoke his will, or by someone other than the testator. Similar issues arise where, as in *Sugden*, the will has been lost and it has been determined that the testator did not destroy it with the intention of revoking it.

The approach the courts have taken in these situations is that it is better to give effect to the testator's intention to the greatest extent possible than to thwart that intention completely by refusing to admit a will to probate if there is incomplete evidence of its contents.³⁴ In *Sugden*, the will of a famous judge had been lost but the Court of Appeal was willing to reconstruct its contents, primarily on the basis of the evidence of his daughter, Charlotte, who had been familiar with the will. This willingness on the part of the court was not affected by the fact that "it was aware that Charlotte could not precisely remember all the legacies and had erred in some particulars."³⁵

Although this has not been tested in the case law, it is possible to imagine situations where so much (or such an important part) of the will is incapable of being reconstructed that the court would not be justified in admitting what remains to probate. This suggests that the court should have a discretion in the matter. One danger is of a double benefit for a family member, who – having received all the testator intended to give him or her under the surviving part of the will – would then get a fraction of the remaining property under a partial intestacy, at the expense of another family member who had been intended to benefit under the missing part of the will. In *Re McEnroe*, however, only one line of the will was missing and it seems most unlikely that it was of sufficient importance to justify invalidating the remainder of the will.³⁶

³² (1876) 1 PD 154.

³³ *ibid*, 237.

³⁴ As was argued (in general terms) on behalf of the applicant in *McEnroe* [2021] IECA 28 [40]-[41], the court leans against intestacy. See also *ibid*, [73].

³⁵ Simon Cooper 'Sugden v Lord St Leonards (1876): Probate of the Missing Will – Hamlet Without the Prince?' in Brian Sloan (ed) *Landmark Cases in Succession Law* (Hart Publishing 2019) 179. See also *Re Yelland* (1975) 119 SJ 562; *In bonis Regan* [1964] Ir Jur Rep 56.

³⁶ It was the final item in a series of gifts, coming after a bequest to a religious order and before the residuary legacy to the testatrix's sister, who was the applicant in the case: [2021] IECA 28 [13]. See *ibid*, [78]: "relatively minimal, constituting a small fraction of the overall will".

To sum up, because counsel failed to identify the correct solution, the Irish Court of Appeal made unnecessarily heavy weather of the case. The court incorrectly concluded that the testatrix's obliteration of a gift in the will, to the point of "absolute illegibility", amounted to the partial revocation of the will by destruction (with the implication that, even if extrinsic evidence had been available, the relevant bequest could not have formed part of the will). The appropriate result on the facts of *McEnroe* would have been to admit the will to probate with a blank space in place of the obliterated gift, not on the basis that the gift had been validly revoked but on the basis that – as in the case of a lost will that cannot be reconstructed with complete accuracy – the court should do its best to avoid intestacy.

Coda: Lessons for Law Reform

Ní Raifeartaigh J explained that "[n]o evidence was adduced before the Court as to why the proviso in s.21 was omitted from the equivalent section in the 1965 Act."³⁷ She noted, without further elaboration, that the parliamentary debates did in fact contain an exchange on the point but that the court was not entitled to take parliamentary debates into account in interpreting legislation.³⁸ The discussion that took place in the Dáil (the lower house of the Irish parliament, the Oireachtas) appears, in fact, to have proceeded on the basis of a misunderstanding.³⁹ Nonetheless, it is arguable that the deletion of the proviso represented an improvement in the law.

The wording of section 21 of the Wills Act 1837 was based on a recommendation of the Real Property Commissioners. However, the text of section 21 does not reflect the relevant recommendation in full.⁴⁰ The Commissioners had recommended that "where a Will is found with unattested obliterations, it should be considered to be wholly unaltered, except that if any words cannot be read nor made out in evidence in consequence of the obliterations, the Will shall take effect as if such words did not form part of it."⁴¹ The

³⁷ *ibid*, [69].

³⁸ *ibid*, citing the decision of the Irish Supreme Court in *Crilly v T&J Farrington* [2001] 3 IR 251. Contrast *Pepper v Hart* [1993] AC 593.

³⁹ An opposition deputy objected to the proviso in the belief that it allowed modifications to the will after its execution if they had the effect of making the meaning of the will "apparent" (i.e. clear). The responsible Minister seemed to accept this interpretation and undertook to look at the drafting of the section. See Dáil Debates 29 Jun 1965, vol 217, cols 82-85. The Minister later moved an amendment to remove the proviso, stating that the relevant words "add little to the section and make it unsafe to rely on": see Dáil Debates 7 Jul 1965, vol 217, col 811.

⁴⁰ As was noted by Sir Herbert Jenner in *Stephens v Taprell* (1840) 2 Curt 458, 467, referred to in *Re McEnroe* [2021] IECA 28 [56].

⁴¹ *Fourth Report of the Commissioners Appointed to Inquire into the Law of England Respecting Real Property* (1833, HCP) 31.

reference to the possibility that the obliterated words could, even if unreadable, be “made out in evidence” (e.g. by reference to a copy of the document or on the basis of the testimony of a witness) shows that the intention of the Commissioners was that unattested obliterations would only have an impact where the original text could not be reconstructed. The Commissioners’ proposed wording would simply have confirmed that the validity of the rest of the will would not be affected by the fact that the obliterated words (not being capable of reconstruction) could not form part of the will.

The familiar wording of section 21 is not necessarily preferable to the one that was proposed by the Real Property Commissioners. Section 21 effectively tells testators that they can amend their wills by means of informal obliteration of a portion of the text but that they cannot validly insert any replacement text. To deal with the consequences of this inconsistency, the English courts have had to resort frequently to the doctrine of dependent relative revocation, whereby the obliteration is treated as ineffective after all because it was dependent on the testator’s assumption that replacement text would be valid.⁴² However, the doctrine seems to involve a significant element of guesswork as to the testator’s intentions, leading to uncertainty as to outcome, and it is uncertain whether the courts will continue to apply it as enthusiastically as before.⁴³ There seems to be a good case for changing the law so that informal amendment of the will, by obliteration or otherwise, would not be permissible.⁴⁴ The Law Commission for England and Wales did not discuss the status of obliterations in its consultation paper on *Making a Will*,⁴⁵ but presumably the broad dispensing power the Law Commission provisionally proposed in relation to the creation of wills⁴⁶ could be applied to validate both informal obliterations and consequent alterations.⁴⁷ If this type of dispensing power were to be introduced, it would make sense for the formal requirements in respect of amending a will after execution to be consistent and (since they

⁴² See eg *Brooke v Kent* (1841) 3 Moo PCC 344; *In the Goods of Horsford* (1874) LR 3 P & D 211; *In the Goods of Patrick Carmody, deceased* (1944) 78 ILTR 112.

⁴³ It is unclear how the more cautious approach to the doctrine advocated in *Re Jones* [1976] Ch 200 would play out in the context under discussion.

⁴⁴ In terms of giving effect to such a policy, the wording of s.86 of the Succession Act 1965 has the possible advantage over the wording originally proposed by the Real Property Commissioners that it does not dictate that the will must invariably be admitted to probate with blank spaces in place of unexecuted obliterations that cannot be reconstructed. As has been suggested earlier in this case note, the court should probably be allowed a discretion in rare cases where so much of the will’s content has been rendered inaccessible that admitting the legible part to probate would risk thwarting the testator’s intentions.

⁴⁵ Consultation Paper 231, 2017. Note the brief discussion in Law Reform Committee *Twenty-second Report (The making and revocation of wills)* (1980) [3.44]-[3.45] (no change in the law recommended).

⁴⁶ *ibid*, [5.81]-[5.105].

⁴⁷ Compare *ibid*, [11.36]: dispensing power would apply where a testator made an unsuccessful attempt to revoke a will by destruction.

could be departed from where appropriate) relatively strict. Thus, even if drastic reform were to be introduced, the deletion of the section 21 proviso would still represent an improvement in the law.